United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,214

684

MILTON ISEN, *et al.*
Appellants

v.

CALVERT CORPORATION,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SEYMOUR FRIEDMAN
H. MAX AMMERMAN

716 Investment Building
Washington, D.C. 20005

Attorneys for Appellants

QUESTIONS PRESENTED

Where seller executed a sales contract for a parcel of real estate, which contract was prepared by a broker, whose commission was to be paid by seller, after discussions with both seller and purchaser, following rejection of an earlier contract differing from the final contract only in the price of the property, and said contract contained an express representation which had been present in the earlier contract reviewed by seller as to the area of commercial zoning of said property, which representation was in fact untrue, are issues of material fact presented sufficient to bar summary judgment for the seller:

(a) Whether the broker was the agent of the seller rather than of the purchaser so that the express representation was in effect the representation of the seller, when executed and confirmed by seller, even though the contract was prepared with the approval of purchaser to conform with the revised price and other terms required by seller after rejection of an earlier contract?

(b) Whether failure of seller to investigate and correct the zoned area representation was merely a factual mistake on its part, or was the reckless failure to inquire into the correctness of facts peculiarly within its knowledge, and whether purchaser was entitled to rely on said representation?

(c) Whether in fact seller made the incorrect representation by mistake, or recklessly or wilfully failed to make inquiry to ascertain the true facts, which were peculiarly within its own knowledge as owner of the property?

(d) Whether purchasers who acted in reliance on the sellers' representation can be said to have participated in a mutual mistake of fact with the seller upon whom they relied?

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No. 20,214

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The complaint herein sought judgment for plaintiffs-appellants against defendant-appellee for damages resulting to appellants from the failure of certain real estate purchased by them from appellee to contain as much commercially-zoned area as was expressly represented by appellee in the sales contract. This appeal is taken from the judgment and order of District Judge Oliver Gasch dismissing the complaint and granting summary judgment in favor of the defendant-appellee. (J.A. 49).

square feet in area, whereas in fact it was only 100 feet in depth, and hence only about 10,000 square feet in area.

Appellants opposed said motion (J.A. 46), and in the annexed affidavit of appellant Milton Isen stated that they did not know or make any investigation prior to settlement of their purchase as to the correct area of the portion of the subject property zoned C-2, but were advised by the broker and appellee of the area thereof as being 12,500 square feet, and that they relied wholly upon said express contractual representations. (J.A. 48) In said appellant's deposition, taken earlier, he stated that he had been advised by the broker initially of the area of C-2 zoning on the property, and that he did not make independent inquiry thereof until after settlement when, pursuant to a desire to secure such zoning for the balance of the subject property he learned for the first time the true area so zoned. (J.A. 18, 20, 29) Isen further stated that the property was first presented for his consideration by the broker, who advised Isen as to the presumed zoning, that he, Isen, had not previously requested the broker to seek to buy the property in appellants' behalf, and that, following submission and rejection by appellee of two proposed contracts, at least one of which included an express representation that the area zoned C-2 was 12,500 square feet, both of which were rejected solely because of insufficiency of the price (J.A. 16, 18, 24, 44), appellant instructed the broker to increase the price to that demanded by appellee, and submitted the final contract with no other change. (J.A. 24, 27). Appellant further testified that the contract was executed, except for one necessary signature on appellee's behalf, at a meeting at the office of W. R. Lichtenberg, Treasurer of the appellee, at which Lichtenberg inserted the word ". . . appr [oximately] . . ." before the figures ". . .12,500 . . .", referring to the area zoned C-2, solely in order to avoid any inaccuracy caused by his lack of certainty as to the exact length of the street frontage of the property (J.A. 21-22, 36, 37), and made an adjustment in the commission payable by appellee to the broker (J.A. 22, 36).

Isen, at his deposition, also stated that appellee, through Lichtenberg, knew prior to entry into the sales agreement, that the property was in fact being purchased in the interest and on behalf of appellants, through the said Patricia Reyes and her assignee, one Arnold Heft. (J.A. 33, 34, 35)

After argument on the appellee's motion, Judge Gasch entered an order, granting summary judgment in favor of appellee and dismissing the complaint herein. (J.A. 49) No statement of the Court's reasons, findings, or opinion therefor were set out by the court below.

STATEMENT OF POINTS

1. The District Court erred in granting summary judgment in favor of appellee and dismissing the complaint herein since, on the complaint, affidavits, and depositions in the record herein, genuine issues of material fact were presented sufficient to bar such judgment, as to:

(a) Whether or not appellants acted out of mistake or were entitled to and did in fact rely on the express representations of appellee;

(b) Whether the broker who prepared the contract containing the representation acted as the agent of appellants or of appellee in making such representation.

(c) Whether or not appellee in making the false representation, acted out of mistaken belief or through reckless or wilful disregard of material facts which it knew or should have known.

SUMMARY OF ARGUMENT

1. Under Rule 56, Federal Rules of Civil Procedure, summary judgment must be denied if there are presented on the record genuine issues as to material facts.

2. Appellants, as purchasers of real estate, are entitled to rely

upon express representation with respect thereto made by or on behalf of appellee, as seller thereof.

3. Genuine issues of material fact were presented on the record herein whether:

(a) The express contract representation as to quantity of C-2 zoned land was made by appellee directly or through its agent-broker, alone, or was made by or on behalf of appellants.

(b) The appellants in fact relied upon such express representation, or undertook independent investigation into the truth thereof, or otherwise knew of the incorrectness thereof.

Accordingly the motion for summary judgment should have been denied.

ARGUMENT

1. Rule 56, Federal Rules of Civil Procedure, Bars Summary Judgment if on the Record Genuine Issues of Material Fact Are Presented

Rule 56, Federal Rules of Civil Procedure, expressly provides that:

> ". . . the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . ."

This Court has previously held that in consideration of this question, a party opposing summary judgment is entitled to the benefit of all favorable inferences that may be reasonably drawn from the evidence for the purpose of defeating summary judgment, and that, if any genuine issue of material fact is presented, the motion must be denied. *Semaan v. Mumford,* 118 U.S. App.D.C. 282, 335 F.2d 704 (1964); *Dewey v. Clark,* 86 U.S. App. D.C. 137, 180 F.2d 766 (1950); *cf. Bowles v. Marsh,* 82 A.2d 135 (Mun. App. D.C., 1951). If any genuine issues of

material fact were here presented by the record on a reading thereof most favorable to appellants, therefore, the Court below erred, and the motion should have been denied.

2. Appellants Were Entitled To Rely Upon the Express Factual Representations of Appellee, and Were Under No Obligation To Make Independent Investigation of the Truth or Falsity of the Facts as Thus Represented

There is no issue here whether or not a factual misrepresentation was made, whether mistakenly or wilfully. It is undisputed that the area of the subject property actually zoned C-2 was approximately 10,000 square feet, that is 100 feet zoned depth by approximately 100 feet of frontage, and not approximately 12,500 square feet, that is, 125 feet zoned depth by approximately 100 feet of frontage, as represented in the contract. Nor is it disputed that the sole reason for the correction by appellee from the original representation of "12,500 square feet" to "appr [oximately] 12,500 square feet" was to take account of the fact that the frontage of the property was not exactly 100 feet, but was a fraction less than 100 feet, though more than 99 feet, and was without any reference to or significance in respect of the presumed zoned depth of 125 feet. (J.A. 37, 38)

It is true that no express bar or prohibition existed here to prevent appellants from making their own, independent, investigation of the correct zoning of the subject property. But they could have ascertained the true facts only by having a full investigation and study made at the appropriate offices of the District of Columbia government, and this, under the rulings of this court, they were not compelled to do. *Seek v. Harris*, 76 U.S. App. D.C. 404, 132 F.2d 19 (1942); *cf. Horning v. Ferguson*, 52 A.2d 116 (Mun. App. D.C., 1947). This is not a case in which the means of knowledge were readily at hand to purchasers — appellants so that it can be said that voluntarily blinded themselves from learning the truth (*cf. Owen v. Schwartz*, 85 U.S. App. D.C. 302,

305, 177 F.2d 641 (1949)), or where they actually undertook an investigation and examination of the true situation (*cf. Graziani v. Arundell*, 55 App. D.C. 21, 299 Fed. 886 (1924); *Shappirio v. Goldberg*, 192 U.S. 232, 48 L.Ed. 419 (1904), aff'g. *Shappirio v. Goldberg*, 20 App. D.C. 185 (1903)). Here, there was an express written contractual representation as to a fact clearly within the presumed knowledge of the seller; which purchasers would have had to make detailed, and perhaps lengthy and expensive, investigation to confirm. The law does not thus far extend the doctrine of *caveat emptor*; nor does it permit the seller under such circumstances to shield itself behind the credulity of the purchasers who relied upon the seller's knowledge and good faith. Even if the seller sincerely believed the representation to be true, the purchasers cannot thereby be compelled alone to bear the consequences of the seller's error.

3. Genuine Issues of Material Fact Were Presented on the Record Below Sufficient To Bar Summary Judgment in Favor of Appellee

(a) The express contract representation as to the quantity of land zoned C-2 was made by appellee, directly or through the broker acting as its agent, and was not made by or on behalf of appellants.

The broker, M. F. Weissberg, in his affidavit herein, stated that he prepared the sales contract after discussions with both parties, and that he inserted the statement as to zoned area based thereon. (J.A. 44). Appellant Milton Isen, in his deposition, stated that the broker had displayed to Isen a plat showing the zoning (J.A. 28, 29, 32), which it can be reasonably inferred was furnished by the seller; that after one contract containing a reference to the area zoned, as inserted by the broker, was reviewed and rejected by appellee with a demand for a higher price, the final contract was prepared with such higher price and without change in the provisions respecting the zoned area. (J.A. 24, 44);

and that at the time of execution of the contract, W. R. Lichtenberg, for appellee-seller, actually corrected the contract provision regarding the area zoned in such manner as to confirm rather than cast doubt upon the basic dimension of 125 feet in depth, which was actually only 100 feet, and which was the basic error grounding the misrepresentation. (J.A. 36, 37) There is no dispute that appellee, and not appellants, were to pay the broker's commission (J.A. 4, 36); and, presumptively, one who pays an agent is the employer of that agent.

Appellee urged below that appellants were the parties who initiated the transaction, sending the broker to seek this property for purchase by them, that appellee had not previously offered the property for sale, and hence that the broker acted solely as appellants' agent, both in seeking the property, and presumably therefore in making the representation as to the zoned area. Appellant has expressly denied all these assertions. (J.A. 28, 30, 31)

Whether or not it be held by this Court that the fact that a broker is acting as the agent for both parties to a transaction is no defense to an action by one party to hold the other responsible for misrepresentations made by the broker respecting such other's property (*cf.* Note (1958) 58 A.L.R. (2d) 10, at page 49, and cases cited therein), it seems clear at least that an issue of material fact is presented by the record here whether the appellants, rather than appellee, were the moving force behind the misrepresentation here involved; and hence that summary judgment in favor of appellee was erroneous.

(b) Appellants did not make independent investigation or inquiry into the truth or falsity of the zoning misrepresentation and were not in fact aware thereof until after settlement.

Appellant Isen has expressly stated, both in his deposition herein (J.A. 20) and in his affidavit (J.A. 48) that he did not know, and did not investigate, the correct zoning of the subject property; and has asserted

that he relied wholly upon the express representation contained in the written sales contract (J.A. 3). Moreover, he has testified that he relied upon the facts of the area zoned as represented both as a basis for his willingness to purchase the property, and as a basis for his willingness to pay the price demanded therefor. (J.A. 27, 41, 48)

Notwithstanding the fact that appellee has intimated both in taking Isen's deposition (J.A. 14, 15, 27) and at argument below, that appellant as an experienced dealer in real estate had ready opportunity to and hence could and should have made inquiry independently into the truth of the appellee's representations, there is at least a factual issue whether he had such ready opportunity (J.A. 15); and serious legal doubt whether the obligation to do so existed.

CONCLUSION

On the law and facts of record as outlined herein, it is submitted that the District Court erred in granting summary judgment in favor of appellee and dismissing the complaint herein.

Whether or not appellee, or the broker, believed that the express representation as to zoned area was true, that representation was inextricably connected with the condition and value of the subject property and directly affected the consideration therefor. *Cf. Turner v. Brewer*, 54 App. D.C. 363, 298 Fed. 685 (1924). Appellants were entitled to, and did, rely upon such representation.

It might be seriously argued that the record below compels the conclusion that appellee wilfully or recklessly made a factual misrepresentation which it knew or should have known not to be true, that appellants relied thereon to their detriment, and hence that appellants are entitled without more to judgment in their favor; but that is not the issue here before the Court. Suffice it to say that at the very least the record herein presents genuine issues of material fact whether the appellants themselves were responsible for or aware of the untrue rep-

resentations, or should have made independent inquiry thereof, and whether the broker acted solely on behalf of appellants so as to charge them, rather than appellee, with the burden of any error he may have committed.

On any of the foregoing, however, it is submitted that the Court below erred in awarding summary judgment in favor of appellee; and it is respectfully requested that this Court reverse the decision below and remand the case for reinstatement of the complaint and such further proceedings as may be appropriate, and for such other and further relief, including assessments of costs against appellee, as to this Court shall appear just and proper.

Respectfully submitted,

SEYMOUR FRIEDMAN
H. MAX AMMERMAN

716 Investment Bldg.
Washington, D.C. 20005

Attorneys for Appellants

CONTENTS OF JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MILTON ISEN
3313 Shirley Lane
Chevy Chase, Maryland
and
ADELE ISEN
3313 Shirley Lane
Chevy Chase, Maryland
Plaintiffs

vs.

CALVERT CORPORATION, a Delaware corporation. Serve: William R. Lichtenberg, Registered Agent, 1730 K Street, N.W., Washington, D.C.

Civil Action
No. 836-65

[Filed April 8, 1965]

COMPLAINT

(Damages for Misrepresentation)

1. The amount in controversy herein is in excess of $10,000.00, and is within the exclusive jurisdiction of this Court.

2. On or about May 21, 1964, defendant, Calvert Corporation, entered into a contract for sale of certain property designated as Lot 815, Square 1300, in the District of Columbia, at and for the sales price of $290,000.00, all cash. The named purchaser in said contract was Patricia S. Reyes or assigns; and the said Patricia S. Reyes nominally assigned said contract to a certain Arnold Heft. A copy of the said purchase contract, containing the said assignment to Heft, is attached hereto as Exhibit A, and hereby made a part hereof.

3. However, notwithstanding that the purchaser was designated in the contract as Patricia S. Reyes, and that the assignee shown thereon is Arnold Heft, the true purchasers of the said property, were Milton

Isen and Adele Isen, his wife, plaintiffs herein; and such parties were known by the defendant corporation to be such purchaser. All actual negotiations for this purchase were carried on by or on behalf of defendant with or on behalf of the plaintiff, Milton Isen, as the true party in interest, and the settlement was actually made in such fashion as to transfer the property to the plaintiffs herein.

4. The purchase contract, Exhibit A, provides in part that ". . . Lot 815, Square 1300, contains approximately 12,500 square feet zoned C-2; balance is zoned R-3." Notwithstanding said express representation, the property in question contains only 10,000 square feet zoned C-2, with the balance zoned R-3 as aforesaid.

5. The aforesaid representation that the subject property contained approximately 12,500 square feet zoned C-2, was made as a representation and statement of fact, which was known or should have been known by the defendant to be untrue, and it was made by defendant with the intent and for the purpose of inducing reliance by the plaintiff thereon. The plaintiffs did in fact so rely upon said representation of fact, and were thereby induced to act to their injury and damage.

WHEREFORE, the premises considered, plaintiffs demand judgment against the defendant in the sum of $50,000.00, plus interest and costs of the suit.

Seymour Friedman

H. Max Ammerman
Attorney for Plaintiffs

1627 K STREET, N. W.
WASHINGTON 6, D. C.

EXHIBIT 1

TELEPHONE: 347-3196

WEISSBERG BROS. REALTY

Investment Sales • Commercial Development

FIRST: Received from Patricia S. Reyes or assigns, *Purchaser, a deposit of* Ten Thousand Dollars ($ 10,000.00) *to be applied as part payment of the purchase of certain real property, together with all improvements thereon, in the ~~County of~~* District of Columbia, *~~State of~~, described further as follows:*

Lot 815, Square 1300, District of Columbia, being approximately 27,930 square feet of land, together with improvements. Included are leases as follows: Peoples Drug Store, $,000 per annum; Stanley Corporation of America, $1,200 per annum; Arena Sport Shop, $ 800 per annum; Gift Shop, $3,900 per annum; Laundromat, $4,200 per annum. No lease shall expire later than 1967, and no options or extensions.

Lot 815 Square 1300 contains 12,500 sq. ft. zoned C-2; balance is zoned R-3.

SECOND: The total purchase price of Two Hundred Ninety Thousand *Dollars ($* 290,000.00 *) shall be paid in the following manner:*

A. Ten Thousand *Dollars ($* 10,000.00 *) being the deposit paid with the Purchaser's execution of this agreement.*

B. Two Hundred Eighty Thousand *Dollars ($* 280,000.00 *) at settlement.*

C. All cash transaction.

Trustees in all deeds of trust may be named by the parties secured thereby.

THIRD: The property is sold free of encumbrance including all charges for the installation of water and sewer lines except as aforesaid; title is to be good of record and in fact subject, however, to covenants, conditions and restrictions of record, if any; otherwise said deposit is to be returned and sale declared off at the option of the purchaser, unless the defects are of such character that they may readily be remedied by legal action, but the seller and agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such prompt action.

All taxes, insurance, rents, and interest are to be prorated as of date of settlement.

Examination of title, conveyancing, notary fees and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser who hereby authorizes the undersigned agent to order the examination of title; provided, however, that if upon examination, the title should be found defective and irremediable, the seller hereby agrees to pay the cost of the examination of the title [illegible] D.C. recordation tax shall be divided equally between Purchaser and Seller.

FOURTH: [illegible] On or before Aug. 15, 1964, or as soon thereafter as a report on the title can be secured, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof. If the purchaser shall fail to do so, the deposit herein provided for [illegible] In the event of the forfeiture of the deposit, the seller shall allow the agent one-half thereof as a compensation for his services.

Realty Title Insurance Co.

Settlement is to be made at the office of [redacted], and the deposit of the purchase money, the deed of conveyance for execution and such other papers as are required of either party by the terms of this contract shall be considered good and sufficient tender of performance of the terms hereof.

Seller agrees to execute the usual general warranty deed, to be prepared at his expense, and to pay for Federal Revenue Stamps on Deed.

Seller agrees to give possession at time of settlement subject to tenancies, and in the event he shall fail so to do he shall become and be thereafter a tenant by sufferance of the purchaser and hereby waives all notice to quit, as provided by the laws of the ~~State of Virginia~~ District of Columbia

The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the seller. In the event that hazard insurance is to be written, it is understood and agreed that agent will cause said policy or policies to be written through a carrier acceptable to the mortgagee.

The seller agrees to pay to Weissberg Bros. Realty, a cash commission on the sale price of the property $19,750.00 W.F.H.

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.

This contract when ratified by the seller contains the final and entire agreement between the parties hereto and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained.

WEISSBERG BROS. REALTY
Agent.

By W. F. Weissberg

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

Patricia S. Reyes Purchaser

Purchaser

May 21, 1964 Calvert Corp Seller

5/21, 1964 by W. F. Weissberg Pres. Seller

Property is to be conveyed in the name

FOR VALUE RECEIVED, I, Patricia S. Reyes, hereby assign all my right, title, and interest in the foregoing contract to Arnold Heft.

Patricia S. Reyes

ANSWER

[Filed April 27, 1965]

First Defense

The Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations contained in Paragraph one (1) of the Complaint and that part of Paragraph two (2) of the Complaint which refers to the contract between the defendant and Patricia S. Reyes; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph two (2) and three (3) of the Complaint which refer to assignments or true purchasers of the property, and will demand strict proof thereof; admits only that portion of Paragraph four (4) which refers to the purchase contract and states that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said Paragraph number four (4); and denies each and every other allegation contained in the Complaint.

Third Defense

The Complaint states upon its face that plaintiffs were not parties to the contract and no privity of contract upon which to sustain this Complaint exists.

Fourth Defense

The Complaint states upon its face that plaintiffs knew, or should have known, and had actual knowledge that the premises conveyed did not contain 12,500 square feet zoned C-2.

WHEREFORE, defendant demands the Complaint be dismissed with prejudice.

LICHTENBERG & LURIA

Joseph Luria

Attorneys for Defendant

DEPOSITION OF ADELE ISEN

Washington, D.C.
November 9, 1965

ADELE ISEN,

a witness of lawful age, was duly sworn by the notary public and, being examined by counsel, testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDLANDER:

Q. Would you state your full name? A. Adele Isen.

Q. That is A-d-e-l-e? A. A-d-e-l-e I-s-e-n.

Q. Do you have a middle name? A. No.

Q. And what is your residence? A. 3313 Shirley Lane, Chevy Chase, Maryland.

[3] Q. You are the wife of Milton Isen? A. Yes. I am.

Q. How long have you been married? A. 20 years.

Q. And during that period, have you and your husband owned real estate together? A. Yes.

Q. Do you know anything about the property involved in this case, the Square 1300, Lot 815? A. No. I really don't. I know where it is, but —

Q. You have seen it? A. I don't think I have seen it. I know generally, where it is. It is Calvert and Wisconsin Avenue, but I don't know specifically.

Q. Do you know what kind of property it is, whether it is improved or has buildings on it? A. I think it has buildings on it.

Q. Do you know what kind of buildings? A. No.

Q. Do you know whether or not it is like a shopping center with a number of stores? A. Well, I know the area because we used to live there. So, that side of the street all with shopping area and restaurants and delicatessens there and that type of thing.

Q. Do you recall when you first learned that this [4] property had been acquired by your husband or by your husband and others? A. Do I recall?

Q. Yes. A. That is probably about a year ago, I think, that he —

Q. Who explained to you about the acquisition of the property? A. No one explained to me anything because I really know very little about it.

Q. Did your husband tell you he had bought the property? A. Yes, just discussing around the dinner table, he talked a little bit about what he did today.

Q. Did he tell you he did it all in one day or over a period of time? A. I really don't know.

Q. All you know is there came a time about a year ago that you learned he had acquired property? A. Yes.

Q. You are not exactly sure what property it is? A. The property on this particular — on the property on Wisconsin Avenue.

Q. Do you know whether your husband acquired it in his name or his name and your name together? [5] A. I guess it is his name and my name because usually, my name appears. He usually buys property with me or —

Q. Do you know Mr. Lichtenberg, the gentleman seated here? A. No.

Q. This is the first time you have ever seen him? A. Yes.

Q. Not having seen him, have you ever talked to him on the phone, to your knowledge? A. I don't think so.

Q. Do you know of any representations he ever made to you about this property? A. Made to me?

Q. Yes. A. No.

Q. You have brought a suit, as one of the plaintiffs. That means you have made a claim, and in the suit you claim that certain misrepresentations were made. You don't claim they were made to you, do you?

A. Well, if they were made to my husband and we own the property, I guess they were made to me.

Q. Physically, were they made to you? A. Physically?

Q. By word of mouth or by telephone? A. No. He never called me.

[6] Q. You never talked to him about this? A. I never spoke to him.

Q. Did you ever go to the title company when the case was settled? Do you know what I mean by that? A. Yes, I do, but I can't remember whether I did or didn't.

Q. Do you recall signing any papers in connection with this transaction? A. I don't know. I signed different papers, but I can't remember this specific paper whether I signed it or not.

Q. In the complaint, that is the paper that was filed for your husband and you by your counsel, it says, 'However, notwithstanding that the purchaser was designated in the contract as Patricia S. Reyes agrees and that the assignee shown thereon, is Arnold Heft, the true purchasers of said property were Milton Isen and Adele Isen, the plaintiff herein. Such parties were known by defendant corporation to be such purchaser. Now, to make it clear to you what you have claimed, the Calvert Corporation is named as the seller and you have claimed in this suit that you and your husband were the true purchasers of the property, and that the Calvert Corporation knew it.

Now, will you tell us what you know about that situation? [7] A. I don't know anything about that situation.

Q. I take it from your statement that you have no knowledge of any conversations of any kind between yourself and Mr. Litchenberg. A. I have never talked to him, never spoke to him.

Q. And you have no knowledge of who the Calvert Corporation is. Have you ever heard of it before today? A. No. I have never heard of the Calvert Corporation.

Q. Now, you have no memory of being at the title company, no good memory of being at the title company when this property was acquired by you and your husband? A. No, I really don't remember. I guess I should, but I don't.

Q. Well, do you have any memory of anything in connection with this transaction and will you tell us? A. I know it has something to do with the zoning and that.

Q. Suppose you tell us how you know that. A. How do I know that?

Q. Yes. A. My husband had mentioned this to me.

Q. Your husband? A. Yes, a long time ago.

Q. Your husband told you about zoning? A. That the zoning — I can't remember.

[8] Q. Can you tell us about the time of that? Would it also be a year ago? A. I don't exactly know the time.

Q. Who was present when you and your husband discussed the zoning of this property? A. Well, he discussed it at home. He mentioned something about it.

Q. Who was present at that time, besides you and your husband? A. I don't think anyone. Maybe, the children were around or the maid might have been around.

Q. Would you tell us the substance of what your husband said at that time? A. I frankly, can't remember. I know it had something to do with the zoning and it wasn't so — let's see. I just can't remember.

Q. Do you ever recall seeing the contract by which this property was acquired from Calvert Corporation? A. I must have seen the contract.

Q. Why? A. If my name appears on the contract, I must have seen the contract.

Q. Have you ever seen a contract for this property with your name on it? A. I don't remember seeing the contract. I don't re-[9] call seeing the contract at all.

Q. Your testimony right now is, you have no memory of having seen the contract for this property with your name on it? A. No.

Q. Can you tell us who Patricia S. Reyes, who she is? A. I don't know.

Q. Was she an employee of your husband's? A. I don't think so, because I don't know her.

Q. What business is your husband in? A. He is in the building business.

Q. Are you familiar with where his office is located? A. Yes.

Q. Where is that? A. The Investment Building, 15th and K Streets, Northwest.

Q. Have you ever visited that office? A. Yes.

Q. Do you know how many employees he has in that office? A. Yes.

Q. Do you know of any employee named Patricia S. Reyes? A. No.

Q. Do you know of any employee named Heft? A. Employee of my husband?

[10] Q. Arnold Heft, yes. A. I know Arnold Heft. I have met him.

Q. Is he an employee of your husband? A. No.

Q. Is he a partner of your husband? A. Is he a partner of my husband?

Q. Yes. A. I don't know. I don't think he is a partner.

Q. What relationship is he, if any, to you or your husband? A. Relationship?

Q. Yes. A. I think they had some business dealings.

Q. No blood relation? A. No.

Q. What type of business relation is this, if you know? A. What type of business? I think my husband owned a piece of property and he bought a piece from him.

Q. Your husband owned property and Heft bought property from

him? Did your husband ever buy any property from Heft? A. Not to my knowledge. I can't remember.

Q. Did he ever exchange any property with Heft? A. Exchange any property with him?

Q. Yes. [11] A. Not that I know of.

Q. Do you know why in your complaint you said that the assignee shown thereon, is Arnold Heft? We are talking about the contract to acquire the property which you and your husband own. In it you say, that the contract designated Patricia Reyes as the purchaser and that the assignee shown thereon, is Arnold Heft. That means, assignee is where you assigned something to a person, and the person who assigns it is called the assignor, and the one to whom it is assigned is the assignee. Do you know why Arnold Heft would have had the contract assigned to him? A. No.

Q. When you and your husband were buying — A. I don't know anything about that.

Q. Have you any knowledge, whatever, of why Arnold Heft's name is mentioned in Paragraph 3 of your complaint? A. No.

Q. Did you ever see the complaint before it was filed? A. Did I see it before it was filed? I don't think so.

Q. Did you authorize it be filed on your behalf? A. I didn't authorize it.

(Thereupon, Mr. Yavener entered the room.)

MR. FRIEDMAN: Could we have this gentleman —

MR. LICHTENBERG: This is Mr. Yavener.

[12] MR. FRIEDMAN: That is just for the record.

BY MR. FRIEDLANDER:

Q. After the suit was filed, did you learn that it had been filed? A. Yes. I believe my husband mentioned something about it.

Q. Was the first knowledge you had the suit was filed when you were told you would have to appear for a deposition or had you known

before that? A. I think I had heard or my husband mentioned something about it sometime ago.

Q. What did your husband say about filing this suit to you? A. He didn't say very much of anything about it. I didn't really pursue it. He just mentioned the fact it was going to be filed and that it had something to do with the zoning, and the zoning wasn't exactly the way the contract had shown when he first purchased it, and that is really all I know.

Q. I have only one other question and that relates to why are you claiming damages against the Calvert Corporation, you, yourself, if you know? A. I don't know. My husband really —

Q. All right. You don't know.

MR. FRIEDLANDER: Do you want to explain to her [13] about waiving signature or signing the deposition?

MR. FRIEDMAN: You have a right — I think we would waive. You have a right to examine or read your deposition before it becomes a formal part of the Court record, or you can waive signature, which means we will accept the Reporter as a proper transcriber of that which you have said. You can do it whichever way you like. I suggest you waive signature.

THE WITNESS: All right.

(Thereupon, the taking of Adele Isen's deposition was concluded.)

DEPOSITION OF MILTON ISEN

DIRECT EXAMINATION

BY MR. FRIEDLANDER:

Q. Would you state your full name, please? A. Milton Isen, I-s-e-n.

Q. You live at 3313 Shirley Lane, Chevy Chase, Maryland? A. Yes.

Q. You are married to Adele Isen? A. Yes.

Q. Now, what business are you in? [14] A. I am in the building and real estate business.

Q. Are you a real estate broker? A. Yes.

Q. How long have you been a real estate broker? A. I would guess, somewhere in excess of 20 years.

Q. During that period, have you always been a broker or were you at one time a salesman? A. I am not really sure if I had a salesman's license or I started out with a broker's license. It has been sometime ago and I am just not sure.

Q. Now, do you recall or can you tell us, whether your business is principally brokerage business or are you engaged in the purchase and sale of real estate on your own account? A. Basically, building and purchasing of property on my own account or with others.

Q. Have you during the past 20 years substantially engaged in the purchase of second trust notes? A. No, not substantially.

Q. Have you, to any extent, engaged in the sale or purchase of second trust notes? A. I would just speculate that in the length of time I have been in business, I must have bought a second trust note or two along the line, but I have never engaged in the —

Q. It is not your principal source of income? A. No.

[15] Q. What is your principal source of income? A. At present it is building property to hold as investment and it has been for awhile, and the purchase of investment property, property for investment.

Q. And it is not the brokerage business? A. No.

Q. Now, in the building or in the purchase of buildings you have become familiar with plans, classifications, and plats? A. In the business of building, I have.

Q. How familiar are you with plans, building plans, can you read them? A. Yes.

Q. Then you are fairly reasonably familiar with them? A. Yes.

Q. You can read them? A. Yes.

Q. Can you read plats? A. Yes.

Q. How often would you say during the past three years you have examined a plat of property? A. In numbers, I would hesitate to give you an answer because I don't know, but I would say that I have occasion to see plats frequently.

Q. You are familiar with what they look like? [16] A. Yes.

Q. And you understand them when you see them? A. Generally.

Q. Do you know anything about zoning? A. Generally.

Q. Now, will you tell us what you know about zoning in the District of Columbia? A. I know the zoning is broken down into classifications.

Q. Do you know what the numbers are for them? A. I know some of them. I know they are divided into residential. They are divided into various categories of residential, and I know there is commercial, and they are likewise divided into some categories. I know that there is industrial, and I believe they are likewise divided into certain categories.

Q. How would you go about determining how property was zoned, if you were interested? A. If I were to go on my own to find out, do you mean?

Q. If you wanted to determine how property was zoned, what would you do? A. I would either look it up in the zoning book or call up the District, I suppose, and find out.

Q. Do you know where the zoning board is located? [17] A. I think it is in the District Building on Fourteenth and E.

Q. Have you ever been there? A. I have been — I don't know if it is the Zoning Board office, but there is an office to do with zoning that I have been to in that building.

Q. For the purpose of going there, was to ask them how certain property was zoned? A. I would imagine that would have been one of the reasons I would go.

Q. In your office, real estate office, you have plats' books, do you not? A. Yes.

Q. Do you have a zoning book published by the District of Columbia. containing zoning maps, showing the zoning of different properties? A. Yes. I have an old zoning book.

Q. Well, is it brought up to date in any way? A. I don't think so, because they have been issuing, I understand, supplements, which you subscribe to, and I haven't been subscribing to them.

Q. When was the last time you used the zoning book that is in your office? A. I don't remember.

Q. You refer to it as an old book. When did you get [18] it? A. I would say probably sometime not too long after zoning in the District was reclassified.

Q. After the Lewis plan? A. Yes.

Q. Would that be in May of '58 or May of '59? A. I really don't remember when that occurred, but whenever that occurred — my general recollection is that I bought that book sometime not too long after that.

Q. Did you use the book at all? A. Yes. I have used the book.

Q. Are you still using it? A. On occasion.

Q. Would you look it up in this book to tell what zoning was, even though you don't have the new amendments or changes? A. I have used it without — although I don't have the amendments, I have used it.

Q. How do you check whether or not there have been any recent changes by using that book? You use that book and find out how it was zoned in '59 and how would you determine how it was zoned in '61 or '62 or '63 or '65? A. I don't recall actually having done that.

Q. What do you rely upon to check your zoning? A. Generally what has been represented to me, I would [19] say.

Q. If someone told you property was zoned a certain way, you don't check it at all? A. I would say, sometimes I do and sometimes I

don't, and I would venture to say that if it is specifically represented to me, I would rely on that representation quite a bit.

Q. As I understand your suit, you are claiming sort of misrepresentations as to zoning of a certain portion of tract which you say you and your wife purchased. Am I generally stating your position? A. Would you mind repeating it?

(Thereupon, the Reporter read the question back as follows: "As I understand your suit, you are claiming sort of misrepresentations as to zoning of a certain portion of tract, which you say you and your wife purchased. Am I generally stating your position?")

THE WITNESS: Yes. I think so.

BY MR. FRIEDLANDER:

Q. Tell us when did you first decide to purchase this property from the Calvert Corporation? A. I believe it was in the spring of last year, which would have been 1964.

Q. How did it come to your attention this property was — A. To the best of my recollection, a salesman by the [20] name of Weiner, who works for Weisberg Brothers who are realtors, and he offered the property to me, wanted to know if I was interested in buying it.

Q. Did you say yes? A. I evidently did, yes.

Q. What do you mean you "evidently did"? A. The fact that I bought it.

Q. Did you or did you not, when he recommended the property, did you then ask him to draw up the contract or make an offer to you? A. To the best of my recollection, I did.

Q. Why do you say "the best of my recollection"? Do you have some doubts? A. I am not quite sure I understand your question.

Q. Did you or did you not make an offer to buy this property? A. Yes.

Q. Did you or did you not make the offer in your own name? A. I don't think I made it in my own name.

Q. Is there any doubt in your mind as to when you made the first offer? A. As to the exact dates there is doubt.

Q. As to the time of year and the year in which you made the offer, is there any doubt? [21] A. No.

Q. Spring of 1964? A. Yes.

Q. And when you made that offer, did you sign the contract? A. I either signed the contract for myself or for — I would guess, I either signed it — wait a minute. I think what I actually did is make an offer in a corporate name but I sometimes use, as a straw to purchase property.

Q. What was the corporate name? A. Probably, Adelton Corporation.

Q. Did you or did you not retain the contract or copy of it after you made your offer? A. I probably have a copy of it.

Q. What happened to the offer? A. Well, it evidently was turned down because it was an offer for less than I eventually paid for it.

Q. Was your offer accepted or rejected? A. It was rejected.

Q. In that offer, did you have the contract prepared before you signed it, completely filled in? A. I don't remember the contract per se, but I am not in the habit of signing the contract if it is not filled in.

Q. What your habits are is no help to us, Mr. Isen. We have to get the facts. [22] A. I know.

Q. Now, was the fact as to how the contract was written when you submitted it — A. Without having the contract in front of me, I cannot —

Q. You have no memory of it at all? A. Other than what I told you that I think it was in the name of Adelton Corporation.

Q. I would accept that, but you are not certain of that, but your best memory is, it is in the name of the corporation you sometimes use? A. Yes.

Q. You also have a memory of the property you were buying? A. Yes.

Q. How do you describe the property? A. How do I?

Q. How did you say you described it in which you say you have a contract of, and I would ask Counsel to let him see it if —

MR. FRIEDMAN: I think he should give his best recollection.

THE WITNESS: Well, my recollection is that it had the lot and block and description of the property and what amount of ground the property contained and what portion of [23] it was zoned in what fashion, commercial, and what portion was zoned R-3. Part of it was commercial and part of it was R-3. I believe this was set forth in the contract.

BY MR. FRIEDLANDER:

Q. This was when the contract was first prepared and before you submitted it in the name of the Corporation? A. Yes.

Q. Now, where did you get the information about the zoning? A. From the broker.

Q. Now, when you submitted that contract, did you not submit the contract setting forth what the broker told you had been zoned C-2 and what was zoned R-3? A. You say, did the contract contain what the broker represented to me?

Q. Yes. A. Yes. I would say so.

Q. You relied on what the broker said? A. Yes.

Q. Did you check it? A. No.

Q. Now, that contract was rejected, was it not? A. Yes.

Q. Because the price was not high enough? A. Yes.

[24] Q. And then, there came a time when you submitted another contract, I presume, after it was rejected you made another offer, did you? A. I made another offer.

Q. Did you raise your purchase price? A. I am not sure. When I say, I made another offer, I am not sure I made it in exactly this same form, that is, Adelton Corporation. Am I answering the question you have asked me?

Q. Yes. Did you make it in the name of Patricia S. Reyes? A. Yes.

Q. Why did you not use the Corporation name and why did you use this lady's name? A. I had a deal with Arnold Heft, in which Arnold wanted to acquire a piece of property that I had an interest in. Rather than make an outright sale, we arranged a contract wherein, prior to Arnold Heft's settling for the acquisition of this property, that I had an interest in, which was known as the Marist tract, in order to keep the story a little easier to follow, I had the right in that contract to select a property that I wanted to acquire, and that I would so advise Arnold Heft of my desire to acquire that property. Arnold Heft then was to procure that property and trade it to me as part of the consideration as part of the property he [25] wanted to acquire from me.

Q. That agreement you had with Heft was in writing, wasn't it? A. Not with me, but I have a copy.

Q. What is the date of the contract with Heft in relation to the date of the contract you sued on which is dated May 21, 1964? A. You mean, that is the one with Calvert Corporation?

Q. Yes. A. The contract with Heft, I believe, and I would really like to check my date, but I believe, was in January of '64.

Q. So when you made the first offer on the name of the Corporation, you had this agreement with Heft, did you? A. Yes.

Q. Were you then acquiring the property or seeking to acquire it so Heft could trade it to you? A. I am trying to think of the reason why I put the first contract in Adelton Corporation's name. I probably made the offer, which was, I realized at the time, was a low offer for the property in the Adelton Corporation's name for either one of two reasons, which I don't recall clearly at the moment. Either I wanted to acquire it with a view of Arnold Heft taking it over, and that is taking it over in order to transfer it to me via the trade route for the Marist tract or [26] it is possible that I wanted to acquire it direct at what I considered a very cheap price at that time, at the time of that offer. I am really not crystal clear in my mind as to my particular

intent upon submitting of that first contract, but that is the question you asked me.

Q. Your idea was, was it not, that you would acquire this tract in the name of Adelton Corporation and you would sell it to Heft at a higher price and then, trade back? A. No. I don't think so. It may very well be — it is a possibility that at that low price I may have felt that this was the property that I just would buy direct and not use it for the trading.

Q. How much was the offer? A. I am not sure, but it was something in excess, I would say, in the neighborhood of $230,000, but I am not sure of that exact figure.

Q. But you do have that contract? A. I think I do have.

Q. Now, is it a fact that the representation as to zoning was made to you by your real estate broker? A. Initially, yes.

Q. Did he make or prepare — did the same firm prepare the second contract which was in the name of Patricia S. Reyes? A. Yes.

Q. Did you just copy the other one, and just raise the [27] price? A. I don't have a specific recollection, but I would presume this is the way we did it.

Q. During this period, and your great interest in the property, you never checked what the zoning was? A. No.

Q. Was there some reason why you didn't? A. No, other than it was represented to me and it was in the contract what they represented.

Q. The real estate firm represented it to you and you didn't take their word they checked the zoning, did you? A. Well, if I had it in the contract, I didn't think I had an obligation to check it.

Q. It is not a question of obligations. It is a question of finding out what the facts are. You felt the property was worth a certain price, worth so much zoning and worth less with less zoning? A. Correct.

Q. And when the real estate man said, this is the way it is zoned, you weren't interested in checking it? A. As long as I have it in the contract, I didn't think it was particularly necessary because when the

seller signed it, he, too, would be representing to me that it would be so zoned.

Q. When you submit a contract to him, didn't you think [28] you were representing to him that this property was zoned a certain way? A. I don't think I was representing anything. I was the purchaser.

Q. Well, didn't you submit the contract with the form of the — A. I represented only that I was willing to pay a certain amount of money, and I think that the representation as to what I was buying was made by the seller and his broker.

Q. Did you look at the contract after it had been signed? Did you look at the contract? A. I looked at it before I signed it, as well.

Q. Did you look at it afterwards, after it came back? A. Yes.

Q. Was there any change in any additional small words in the part referred to as zoning? A. Actually, as it was physically at the signing of the —

MR. FRIEDMAN: Are you referring to the final contract?

BY MR. FRIEDLANDER:

Q. Which one are you talking about? A. The final contract with Patricia S. Reyes.

Q. Yes. When you got it back, did you see something added [29] to it? A. I was sitting at Mr. Lichtenberg's desk and he inserted APPR in front or next to or in close proximity —

Q. What does that mean? A. — I know, because at the time, he mentioned why he put it in.

Q. What did it mean? A. The reason being "approximately" that was the abbreviation for approximately, because there was a question as to the exact frontage. It was slightly under 100 feet and 100 by 25 feet, which would then make a 12,000 feet of zoned commercially zoned ground. This was not exactly the case because it was a little under. I don't believe Mr. Lichtenberg realized exactly how much under 100 feet, but rather than go out on a limb and say, 100 by 125, therefore, 12,500 feet because it is less than 100 feet it has to be approximately.

I was there when he made this little notation and he also made another little notation about commission and so far as I can recall, those were the only two notations he made on that contract.

Q. Well, now, let's go back to the offer. When the offer was made, the name Patricia S. Reyes appeared in the contract as if she were the purchaser? A. Yes.

Q. Who is Patricia Reyes? [30] A. She served as a straw party being — she is or was, I am not sure of her present status, secretary in the office of Marvin Weisberg or Weisberg Brothers.

Q. The real estate firm? A. Yes.

Q. So the real estate firm furnished the straw? A. Yes.

Q. And you dealt with them? A. Yes.

Q. And they prepared the contract, and then who went over to Mr. Lichtenberg's office with the contract? A. Mr. Weisberg and myself.

Q. How about Patricia Reyes? A. No.

Q. Just the two of you met with Mr. Lichtenberg? A. Yes.

Q. Who else was there? A. I don't recall anybody else being there.

Q. And do you recall the time of the day you went there? A. I think it was in the afternoon.

Q. Can you fix the approximate time? A. I can't, no.

Q. You don't have any memory of it? A. I really don't know what time it was.

[31] Q. This was an important item, wasn't it, to you? A. What, the time?

Q. The acquisition of this property. A. I think every deal is important to me.

Q. This was particularly important because this was a tax saving rather than a deal, wasn't it? A. As I say, it is relative as to how important it was. It was important, of course.

Q. What would have been the tax on the sale of your property to Heft? A. I don't know right at this moment.

Q. What was the sale price? It was unimproved land, wasn't it? A. Yes.

Q. What was the sale price of the land? A. I think it was $775,000.

Q. What had been the cost of this land? A. I am not sure. I would have to look that up.

Q. It was a very low price, wasn't it? A. It was less than my sale price.

Q. It was less than half your sale price? A. I don't think so at all.

Q. Didn't you have a tax close to $50,000 involved? A. I could look this information up.

Q. What is your memory now, as to what your tax liability [32] or possibility might be? A. I don't have a recollection of what my tax possibilities were at the time.

Q. It was very high, wasn't it? A. Yes. That is because I wanted to go into a trade.

Q. So, in making the trade, it made or meant that you saved in cash, the tax which would otherwise you would have paid? A. It would have postponed it, I would rather say.

Q. You would rather say. A. I think the Government would say it, too.

Q. I don't know what the Government would say about it, but let me not ask the Government at this point, but rather for your sake and rather for mine, let's just presume this was either important to you, this tax savings, or it was not important, and I think we can agree it was very important that you make a trade and not a sale. It was a very important tax savings, was it not? A. I would imagine at the time it was an important tax savings.

Q. Important enough to go through all the rigramole of having a straw come in and make believe she was buying. A. Any savings is important to me, but the amount as I answered you before, I am not or

I don't recall, but I would generally agree with you it was an important tax savings.

[33] Q. You don't have any memory now, as to the time of the day of the afternoon you went to Mr. Lichtenberg's office with Mr. Weis or Mr. Weisman? A. Weisberg.

Q. You don't remember that? A. The time of the day?

Q. Yes. A. I am quite sure it was in the afternoon but if I could recall something that would relate it, I could relate to, I would be able to more exactly pinpoint what time or whether it was early afternoon or late afternoon.

Q. Well, let's go back. When had you prepared or when had the contract been prepared which was signed by Patricia Reyes. When had it been typed up, in the morning? A. I don't know when.

Q. Was it typed up in your presence? A. No.

Q. How did you happen to ask them to prepare this new offer? A. Well, the broker came back—at this time, my recollection is that I was no longer dealing with, after the first offer was made, I was no longer dealing with just Ben Weiner but with Marvin Weisberg, as well. I believe that both of them came to my office and, having had a conference [34] with Mr. Lichtenberg as to what he would take for the property, came back and tried to get me to pay a higher price for the property, which I agreed to do.

Q. No, when did you agree to pay the higher price? How long before the contract was drawn, talking about the second contract, the Reyes contract? A. The last contract?

Q. Yes. A. The final contract.

Q. Yes. How long was it before? A. I would say, a short time. I don't know.

Q. A day, a month? A. It wasn't a month. I would say, it was probably have been a day or two or three, something like that.

Q. And where was the contract drawn, in your office, the last con-

tract, your office or their office? A. My recollection is, it was drawn in their office.

Q. And were you present when it was drawn? A. No.

Q. Who told you it was ready for signature? A. My recollection is, it was Mr. Marvin Weisberg.

Q. Called you on the phone? A. Probably called me on the phone to come over and get my signature.

Q. Why did you put your signature on the contract? [35] A. I beg your pardon. He probably came over to secure my signature on a check as a deposit.

Q. The check didn't have your signature on it, did it? A. Yes. The original check, I think, did. Wait a minute. Wait. Wait a second. I believe he put up the first—I think he put up the deposit check that went with the contract, and then I subsequently gave Marvin, that is, Weisberg, my check to reimburse him for the deposit he had put up for me.

Q. You are saying now, that the real estate firm put up your deposit? A. I think so. That is my recollection.

Q. Did you ask him to? A. I don't recall.

Q. Well, what is your memory as to why they put up the deposit for you, if you don't remember whether they or whether you asked them for it? Did they volunteer to do it? A. If I remembered that, I wouldn't have said I don't remember.

Q. I suggest to you that you should remember such an important item, and I wonder why you don't. A. I can't answer you as to why I don't, other than I don't. I would speculate that I probably said, "Marvin, would you put up the check for me?"

Q. Why would you do that? [36] A. Because I can't imagine him volunteering to do it.

Q. You can't realize him putting it up at all? Was it $5,000 or $10,000 deposit? A. I don't remember.

Q. Anyway, you didn't put up the check. A. I gave him back whatever he put up for me.

Q. Didn't you have somebody up at the title company at this time, or didn't Mr. Heft have somebody up at the title company? A. Yes.

Q. When he gave a deposit on his purchase of your land, which was signed in January of 1964 you told us, and what happened to that deposit? Isn't it a fact he used that as a deposit? A. I think you are right. I would like to check my record because you are asking me something that occurred about a year and a half ago, and I am answering you from memory. I am answering you to the best of my ability from memory, without checking the figures and facts and dates you are asking me about.

Q. I am not asking you about any dates. A. You have asked me dates in the past and also, times of day even, but let me say, you may be right because I remember now that I had to sign something to the title company, which authorized them to release, and I think it was, $10,000 [37] of Arnold Heft's deposit, which he had up for the purchase of my property. I presume he must—or that was released in order to reimburse Weisberg and if that is the case, I didn't write a check to Weisberg direct.

Q. Let's go back one moment. When you submitted the first contract, didn't you give the authorization to the title company to use that as a deposit? A. No, because it never became a ratified contract first.

Q. Who put up a check on the first contract? A. I presume I did, but I can't specifically tell you, but I presume I did.

Q. But the first offer was handled different from the second? A. Yes.

Q. So far as the deposit is concerned? A. Yes.

Q. They did come over to your office, you say? A. I believe so. I am just trying to think if they came over. I know they have been over to the office, but whether they came over per se at—if they came over

to secure from me my signature, as I mentioned before at that moment, I seem to recall he had a check or what have you. I am not sure, I know they have been in my office to discuss this deal, but to answer your question, as I understand it [38] right now, is did they come over to my office with this last contract?

Q. Yes. A. I don't recall. My only clear recollection with this last contract is that Weisberg and myself came over to Jeff Lichtenberg's office with the contract.

Q. Where did you leave from before you came to Jeff Lichtenberg's office? A. I think I stopped by Weisberg's office, which is on the way here.

Q. At the time, was the contract already prepared or did you stop to prepare it before you came over here? A. My recollection, is that it was prepared.

Q. Now, at whose direction had the contract been prepared, prior to the time you stopped by to join them in a visit to Mr. Lichtenberg? A. Who told them how to prepare the contract?

Q. Who told them to prepare the offer? A. I did.

Q. At that time, you told them how much to offer? A. Yes.

Q. Did you tell them how to describe the land? A. I don't remember if I told them how to describe the land, or if, or specifically, or if I told them just to make it like the first contract.

[39] Q. Well, did you, between the time of the first contract and the time of the second contract, open that little book in your office and look at the zoning? A. No, sir.

Q. Did you ask the real estate firm to check the zoning? A. No, sir.

Q. It was important to you, was it not, financially to make sure you had all the zoning called for or mentioned by the real estate man to you originally? A. Yes.

Q. What steps did you or the real estate firm take to check that

this was correct? A. I can't speak for the real estate firm, but myself, I took no separate independent action to check it.

Q. What did the real estate man say to you as to how he knew what the zoning was? A. I don't recall.

Q. Did he tell you he had checked it? A. I don't recall.

Q. Were you laying a trap for someone when you put in the wrong amount of the zoning? A. No, sir.

Q. Did you or the real estate firm plan to put in the wrong zoning in hopes that you might trap someone? [40] A. No, sir.

Q. Were you attempting to build up for a law suit? A. No, sir.

Q. Can you tell us why you didn't check the zoning? A. I didn't think it was important to check it because it was represented to me in the contract. If it weren't in the contract, that would have been something else.

Q. You are not being particularly fair to us, I suggest to you. You told us the real estate man said that he had found out what the zoning was, but you never, at anytime, asked him how he found it out. A. I don't recall asking him how he found it out.

Q. Weren't you surprised when the real estate man said this is the way the property is zoned? A. Why should I be surprised?

Q. Well, how would you know how the property is zoned? A.. As a reputable broker, I presume, he made inquiries with the owner, as to what the owner was selling.

Q. He didn't tell you he ever contacted the owner, did he? A. No.

Q. As far as he was representing you an offer for a property that didn't even have a listing, you knew that? A. I don't think I knew that.

Q. You are saying the real estate man didn't tell you [41] he didn't have a listing, and you would have to make an offer? A. I don't recall his not telling me that he didn't have a listing or his telling me that he did have a listing.

Q. Are you saying to us, he was authorized to offer that property for sale? A. I would have made this assumption.

Q. Did he tell you that? A. He had a plat that showed this property and showed it adjoining property, namely, the Calvert Theater and a summary on that plat showing how the zonings were divided.

Q. Did you look at that plat? A. I looked at that, and both of those, the summary and the plat, which were presented to me. This is how the property was first presented to me, as I recall, and indicated the amount of zoning and the size or amount of the footage the property contained in general.

Q. Did you look at the way the plat described the zoning? A. Yes.

Q. How did the plat describe the zoning? A. To the best of my knowledge, the Calvert piece was an excess of 17,000 feet zoned commercial, and it may have been 17,500 foot at the balance zoned R-3. There is the Calvert Theater piece and the Calvert Corporation piece was 12,500 feet zoned commercial, and the balance of 15,000 some— [42] I don't remember, between 15 and 16,000 feet was zoned, I believe, R-3. This was indicated on the material that he brought to me when he first offered the property.

Q. Did he offer you the property or didn't you go to him to find some property for you? A. He offered me this property. I may have gone to him sometime after making the deal with Heft or not particularly go to him, but I probably—I will take the word probably back. I might have asked him, as I have asked a number of brokers when I meet them, what have you got to sell.

Q. Let's get back to facts, Mr. Isen, and stop playing around with words. Did you or did you not go to that broker Weisberg and ask him if he had property, to find you some property? Answer that yes or no, if you will.

MR. FRIEDMAN: If you can.

BY MR. FRIEDLANDER:

Q. If you did go to him and ask him say yes, and if you didn't, say no. A. I don't recall going to him and saying, find me some property.

Q. Is your testimony that you did not go or you don't remember

whether you went or not? A. My testimony is, I don't remember going to him.

Q. And that is the same as saying you didn't go to him. [43] A. It isn't. I say, I have no recollection. I didn't say, I didn't go. I didn't say I did go. I said, I have no recollection. I am not trying to evade it. I am trying to answer your question as fairly and completely as I can.

Q. I don't think so.

MR. FRIEDMAN: I think the record should show Counsel should stop arguing with the witness.

MR. FRIEDLANDER: We have not yet found out whether you are saying, yes or no to that. I think you are saying, perhaps.

MR. FRIEDMAN: I think the record speaks for itself.

MR. FRIEDLANDER: I don't think it does.

BY MR. FRIEDLANDER:

Q. I would like the witness to tell me, if you will, did you go to this broker Weisberg and ask him to find you some property after you made the deal with Heft? A. I would say, Mr. Friedlander, that I have probably asked Marvin Weisberg, along with a number of other brokers—

MR. FRIEDLANDER: Do you think this is the answer to the question?

MR. FRIEDMAN: If you let him finish his answer, he is giving you the best answer he can.

THE WITNESS:—both before and after signing the deal with Arnold Heft for a good period of time to submit to me decent property which they may have for sale, and very [44] specifically, I don't remember going to Weisberg and asking him to find me a property per se as a separate piece of business which I think you are trying to ask me if this is what I have done.

BY MR. FRIEDLANDER:

Q. I am only trying to find out what the facts are. In January you made a deal with Heft. In order to make a tax savings you have to have

trade. In May or April you still had not gotten that trade, and didn't you go then to the broker Weisberg and ask him to find you some property? A. I think I have already answered your question.

Q. You said that you asked them to let you have property that they had for sale. The question now is, whether that is true or whether you went to him and asked him to find you some property.

MR. FRIEDMAN: The question has been asked and answered three times, to the best of the witness' recollection, and I am going to tell the witness—

MR. FRIEDLANDER: I don't think so.

MR. FRIEDMAN: You don't believe?

MR. FRIEDLANDER: You tell him anything you want.

MR. FRIEDMAN: Are you stating that you don't believe what he is saying or he has not answered the question?

MR. FRIEDLANDER: He has not answered the question.

MR. FRIEDMAN: He has answered it three times.

[45] MR. FRIEDLANDER: Let's get it straight now.

MR. FRIEDMAN: If you can, answer the question.

BY MR. FRIEDLANDER:

Q. Without a lot of ifs, ands, and buts, did you or did you not go to broker Weisberg and ask him to find some property for you? A. Is that the end of your question?

Q. Yes. A. Because it is different than the question before.

Q. I want to know if he ever went to him and asked him to find some property. A. I would say, yes.

Q. Now, did you go to him, Weisberg, after you made the Heft deal and ask him to find some property? A. I don't recall doing that.

Q. All right. We have now gotten to a point where a contract is prepared in the name of Patricia Reyes and the zoning apparently, predicated upon some plat that you saw. Was the plat attached to the contract before it was submitted? A. I don't recall.

Q. What happened to the plat that you had used in basing your opinion that the land contained 12,500 square feet—

MR. FRIEDMAN: I object to the question. This is [46] putting words in the witness' mouth and treating supposititious opinions as though they were facts. If there was such an opinion. You may answer the questions. You may answer, if you understand it.

MR. FRIEDLANDER: Let me reframe it.

BY. MR. FRIEDLANDER:

Q. Did there come a time when you saw a plat that showed 12,500 square feet zoned C-2? A. Yes.

Q. What happened to that plat? A. I may have it.

Q. Where would you have it? A. If I have it, I would say it is in my file in my office.

Q. Why would you have that plat? A. Because it pertains to the purchase of the property.

Q. Who gave you the plat? A. The broker.

Q. When did he give you the plat? A. I presume, at the time he offered it to me.

Q. That means, the time when you drew—A. When he offered me the property.

Q. The first contract you are talking about? A. I presume that would be the time.

Q. So you had the plat from the time of the first contract [47] in the name of Adelton Corporation? A. Yes.

Q. How was the plat available to the broker when he drew the second contract, if you had already gotten the plat? A. I had or still have, as I say, I am not sure whether I have it still. I think I do. I had a verafaxed copy or some kind of copy, and I presume that the broker had a copy of his own.

Q. Before you submitted that first contract, didn't Weisberg tell you that that property was not on the market? Answer that yes or no.

A. I don't think he told me it was not on the market.

Q. Are you denying or are you saying that you don't remember? A. I am saying I don't remember.

Q. Now, the plat of which you have a copy, the original plat, was still in the office of the broker at the time you submitted the second contract? A. I don't want you to think there was only one copy of this plat that either I had it or he had it, but both of us couldn't have it at the same time.

Q. I understand he made a verafaxed copy. A. I think this is the situation.

Q. He kept the original? A. I don't know if he had the original, but he had a [48] copy, I am quite sure.

Q. The copy he had showed the 12,500 square feet of C-2 zoning. Now, when the contract was drawn you or one of the brokers or two of the brokers went over to see Mr. Lichtenberg. Will you tell us who it was who went with you? A. Marvin Weisberg.

Q. Marvin Weisberg and you went to visit or see Mr. Lichtenberg. Did you have an appointment, if you know? A. I think we did.

Q. When you came in, how were you introduced to Mr. Lichtenberg? Were you introduced as the purchaser? A. I don't remember a specific introduction because I believe, Mr. Lichtenberg and I have either met on occasion, certainly I have known of him, and I believe he has known of me, and I don't know how much introduction was necessary.

Q. When did you meet Mr. Lichtenberg before this deal? A. I can't give you specifically when, but I have a faint recollection I have met him before.

Q. Can you tell me where, if you don't know when? A. I can't tell you where.

Q. Can you tell me who introduced you to him? A. I would speculate it is possibly my brother who knows him, my brother Dave or possibly, Joe Luria, who is his law partner.

Q. When you came in, did you see Joe Luria? [49] A. I don't remember if I saw Joe or not.

Q. When you met Mr. Lichtenberg, what did Weisberg say to him in your presence? Start at the beginning. You came in the office and what office did you go to? A. Mr. Lichtenberg's office.

Q. In the back here, in this suite of offices, in his room? A. It was in his room, I believe, and I believe it was at his desk we were sitting, and my recollection is, that it was this suite of offices because I remember turning left to come out of the elevator today to come here.

Q. Let's say you are in his office. What transpired? What did he Mr. Weisberg say to Mr. Lichtenberg? A. As I say, Mr. Weisberg said—

Q. What did he say to him? A. I sat to the left of Mr. Lichtenberg.

Q. What did he say to him? A. I can't remember verbatim or per se what he said, but whatever he said was talking about the contracts, which he presented to Mr. Lichtenberg for signature.

Q. You walked in the office, sat down, and you weren't introduced to him? A. I say I am sure I was introduced in some fashion.

Q. Who were you introduced to? A. You asked me a question, was I introduced as the [50] purchaser.

Q. This is a different question. Were you introduced to him? A. I imagine I was introduced and we shook hands.

Q. You imagine. Do you have a memory of it? A. No.

Q. Do you remember why you didn't tell him you were the purchaser? A. I am not sure that I didn't tell him I was the purchaser.

Q. Did you tell him? A. I said, I am not sure.

Q. You present a contract which is in the name of Patricia Reyes and you are not certain that you were not introduced as the purchaser. You submit a contract and somebody else's name— A. I presume I was introduced as the purchaser not at that time, but previously, because I am quite sure when Marvin Weisberg discussed this deal with Lichten-

berg it was on my behalf, and I believe this was quite clearly known to Lichtenberg.

Q. You used a corporation name when you first submitted the contract that was rejected. You come back with a contract in the name of a straw, and you say that in your presence someone introduced you or made known the fact you [51] were the purchaser? A. Well, to go back to what you first said, the corporate contract would probably have been signed Milton Isen, President.

Q. Was it? A. That is the only way I signed a contract for Adelton Corporation.

Q. Was it signed that way? A. If it was signed, it was signed that way.

Q. Was it signed? A. I think so. I can answer your questions specifically, if I had the documents in front of me, whether I signed or how I signed and dates and places and everything else. You are asking me from memory without papers in front of me.

Q. Mr. Isen, I want to know primarily if you are insisting or stating under oath, you were introduced to Mr. Lichtenberg as the purchaser at anytime? A. You are asking me the question?

Q. Yes, sir. Now, if you say yes, I want you to tell me when and where. A. I am sure I was introduced to Mr. Lichtenberg as purchaser. Maybe, not as Mr. Lichtenberg, this is Mr. Isen the purchaser, but I was introduced as purchaser, if not in the specific way I just mentioned, then, in the discussions [52] as to who was buying this property.

Q. Were you buying the property? A. Yes. I eventually was buying the property.

Q. Were you intending to buy the property at that time, and was she a straw party for you? A. She was a straw party for me, Patricia Reyes.

Q. I thought you said this was a trade deal. A. That is right. I

didn't want my name to appear in the original contract so that when Arnold Heft acquired it he could trade it to me.

Q. Were you committing a fraud on the Government? A. No. This was all written out in a document that everybody had signed and prepared by very reputable counsel.

Q. I understand that you actually used a straw party to buy this property, and then you turn around and pretend to trade this property for property you are selling. A. You can call it pretend, but it is according to the way our contract was drawn.

Q. Either you purchase the property through a straw, or Heft purchased the property through a straw. Now, which is it? A. Heft, on my behalf, purchased this property through a straw. Did I answer the question you asked me?

Q. Go ahead and answer anyway you want. Go ahead. [53] A. I answered it.

Q. Now, will you tell us please, at this meeting what else transpired, speaking of Jeff Lichtenberg's office, you say you were introduced as the purchaser directly or indirectly. Now, what else transpired, what happened? A. There was a discussion over the amount of commission that Weisberg had put into the contract. I don't remember what he had put in, but evidently, it was more than Jeff felt was according to the general custom, according to the Real Estate Board.

Q. What happened after that? A. They changed it to a different amount.

Q. They adjusted that? A. Yes.

Q. What else happened? Did Mr. Lichtenberg put down APPR in front of the zoning? A. Yes.

Q. What is the conversation that led up to him writing that down? A. My recollection is that in order to make this—

Q. What did he say? Tell us. A. My recollection is, that he said something to the effect that the frontage, this not a clear cut 100 feet. It is something less. It is 99, point something.

Q. How did that effect the zoning? [54] A. I am answering your question. For that reason, the 99 point something by the 125 deep would not equal 12,500 feet of commercially zoned ground. My recollection is that he put in "APPROX" in order to clarify that.

Q. And also, what did he say to Weisberg at that time? A. What did he say to Weisberg at that time?

Q. Yes, about the zoning. A. I don't remember what he said to Weisberg.

Q. Did he tell Weisberg to check at the zoning office? A. I don't recall him saying that.

Q. Do you deny he said it? A. I said, I don't recall him saying it.

Q. Now, what other conversation did you have about the zoning? You said you were or he knew you were the purchaser. Did you say to Mr. Lichtenberg—now, this is your representation as to zoning, I am going to rely on it? A. No. I didn't say that.

Q. Did anybody in your presence, particularly Mr. Lichtenberg, say I am not sure about the zoning? A. I don't recall him saying that.

Q. What did he say about the amount of zoning? A. Other than what I have already related, I don't remember our discussing it any further.

Q. What did you say to Lichtenberg? Did you say you [55] were relying on that zoning and for him to be very careful about it? A. No. As I said, I don't think we discussed it any further than I have already related to you. As I say, I don't recall having discussed it any further.

Q. And what happened next? A. In what respect?

Q. Did Mr. Lichtenberg sign the contract? A. I don't remember if he signed it right then and there or if he sent it—I think it had to go out of town for someone's signature in the corporation.

Q. Do you remember who it was they had to send it out of town to? A. Pardon?

Q. Do you remember Mr. Lichtenberg saying, "I will put this in an envelope and send it out of town to get it signed"? A. I don't remember

whether we left with the contract in our possession or it was left there for him to send to someone to sign or not. I don't recall. Is that answering the question you asked me?

Q. Now, when the change was made to add "APPR" that zoning clause wasn't that initialled by Mr. Lichtenberg? A. I presume it was.

Q. Would you like to see the copy you furnished us? A. Yes.

[56] Q. Whose are these initials? A. I presume it is Patricia Reyes.

Q. Is that Patricia Reyes' initials? A. I don't know.

Q. Did you put them on there? A. I don't know.

Q. Were they put on the same day? A. I presume they were.

Q. How did you get her over to Lichtenberg's office? A. Possibly, Marvin called her.

Q. Do you remember her coming over? A. No.

Q. Now, why were you going through the formality of pretending she was or her signature was necessary when Mr. Lichtenberg knew you were the purchaser? A. I think, probably, this was a legal requirement that she initial.

Q. Only if she is the purchaser, but she wasn't the purchaser. A. She was the nominal purchaser, I believe.

Q. She was a purchaser? A. For me.

Q. If you were the disclosed principal, why didn't you initial it? You were sitting right there. Why didn't you initial it? [57] A. I don't think I initialled anything or signed anything, as far as this particular contract.

Q. But, you said you were known to be the undisclosed purchaser, so why didn't you sign the contract and why didn't you initial the change? A. My name, not Patricia Reyes, I would not have that right.

Q. One other item. Then, there came a time after you closed the transaction and you got your trade and you now own this property, and the other fellow Heft owned the other property out in the country, and you then made some claim against Mr. Lichtenberg, claiming he sold

you this land and the zoning wasn't like he represented. Do you remember that? A. Yes.

Q. Do you remember that he offered to buy the property back for what you paid for it? A. Yes.

Q. If you had been defrauded, why didn't you accept his offer? A. Well, as I believe I told Mr. Lichtenberg, I acquired this property through a trade and that I had no way of knowing how I could undo this particular deal.

Q. Sell it. A. So, I would be made whole again.

Q. If you sold it for the exact price. [58] A. Then I would have whatever tax consequences would have befallen me had I made a cash sale with Heft to start with.

Q. You don't think you have that problem now? A. I don't know.

Q. With your statements? A. This trade route was proposed upon advice of competent tax and legal counsel.

Q. Nobody ever told you that you could buy both properties and then make believe it was a trade, did they? A. Yes.

Q. They did? A. Yes.

Q. In other words, it is perfectly all right for you to use a straw and buy this property and pretend somebody else bought it and made a trade? Tax wise, you think it is all right? A. I thought it was all right, as long as it was clearly spelled out in the contract, which it is.

Q. And as long as you don't let the Bureau know that you actually bought this property like you told us today? A. It is all spelled out in the contract and as it is spelled out in the contract, that is the fashion which I acted in.

Q. That is your baby. That tax problem is your baby. [59] Now, what effort did you make to rezone the property? A. Since owning the property, I engaged Norman Glasgow to try for a rezoning.

Q. Did you just seek a rezoning of the 2,500 or the balance of the 2,500? A. No. I sought a rezoning for the entire tract.

Q. You knew Mr. Glasgow told you you couldn't get that, but he told you you could get the 2,500 square feet, didn't he? A. No.

Q. Your testimony is, you were not advised by him he could successfully rezone the 2,500 feet? A. You just said to me, he couldn't get the whole thing zoned, but he could get the 125 feet.

Q. I said 25,000. A. And what I am saying to you is, he didn't say to me, you can't get the whole thing zoned because otherwise, we certainly wouldn't have filed for the rezoning, which we have filed for.

Q. You could have applied for and received the zoning for the 125 feet tract? A. I don't know.

Q. You have never tried? A. No. The only rezoning application we made was for [60] the entirety.

Q. And by the entirety, you mean, not only the property you bought from the defendant corporation but other property besides? A. Yes. Mr. Glasgow felt—

Q. I just want to know what you attempted to rezone. A. In the interest of getting my property rezoned, we made application for adjoining properties, as well.

Q. I see. Well, now, did you ever talk to Mr. Lichtenberg and did he ever offer to, free of charge, rezone or have rezoned the 2,500 square feet. Such portions were not then zoned C-2. A. In the telephone conversations which we had, at the same conversation that Jeff offered to buy the property back, which, at that time, I explained to him why I couldn't, he did not guarantee to get it zoned, but he offered free of charge to represent me in an effort to get the 125 feet zoned.

Q. Did he tell you in his judgment it could be rezoned? A. I am not sure, but I think he did.

Q. Now, tell me what are your damages that you claim. A. The difference in value between the land I contracted to buy, and the land that I received.

Q. And have you had expert appraisals made of this [61] property. A. No.

Q. Who have you asked about it in order to reach a conclusion that the difference in value is $50,000? Who did you ask about it? A. I don't think I asked anyone specifically that question.

Q. Where did you go get the figure from? A. From my own knowledge.

Q. It is your appraisal? A. Yes.

Q. What was the value of the property at the time you bought it, fair market value? A. Well, what I paid for it?

Q. How much was that? A. I believe it was either, I think, it was $290,000.

Q. What is the fair market value now? A. Today?

Q. Yes. I would have to give that some thought and a little inquiry.

Q. Are you saying today, it is only worth $240,000? A. $240,000?

Q. Yes. A. I have no reason to think that it has gone down in [62] value.

Q. If the market value at the time you bought it was $290,000 and the market value is $290,000 now—A. I didn't understand your question. In other words, the way I bought it and the way it is today, which is the same way, is it worth less today than or when I bought it? Is this your question to me?

Q. Yes. It is. A. I would say it is worth less than what I paid for it because of the fact that it isn't zoned the way I—

Q. That is what I asked you. You claim it was worth $290,000 when you bought it? A. Yes.

Q. And it is now worth $240,000? A. Let me say this. It was worth $290,000 when I bought it, at least, I was under the impression it was worth $290,000 when I bought it, but subsequently when I found out I did not buy what I thought I had bought, I would say then it was not worth $290,000 at the time I bought it.

Q. It was was worth $240,000? A. I would have imagined it was worth that, yes.

Q. Would you sell property, would you sell the property for $290 that is only worth 240? A. I don't know if I want to sell the property.

Q. Well, I understand Mr. Lichtenberg wanted to give [63] you 290 for it. A. Yes.

Q. And you didn't want to take it? A. I explained at that time why I wouldn't or couldn't.

Q. Well, that is all.

MR. FRIEDLANDER: I have no other questions.

MR. FRIEDMAN: I think we will waive signature.

(Thereupon, at 3:41 p.m., the taking of Milton Isen's deposition was concluded.)

[Filed Feb. 14, 1966]

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant, the Calvert Corporation, and moves this Honorable Court for a summary judgment in its favor, for the following grounds:

1. From the depositions of the Plaintiffs, and the affidavit of the real estate broker, and from the allegations contained in the answer to the complaint, there appears to be no issue of fact.

2. It being clear that the contents of the contract were by error or mistake, the cause of action of the Plaintiffs should be dismissed.

FRIEDLANDER & FRIEDLANDER

/s/ MARK P. FRIEDLANDER
Attorneys for Defendant

[Certificate of Service, dated February 12, 1966]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The motion for summary judgment, being obviously correct, it should be granted.

FRIEDLANDER & FRIEDLANDER

/s/ MARK P. FRIEDLANDER
Attorneys for Defendant

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA, SS:

M. F. Weissberg, being first duly sworn, on oath deposes and says that he makes this affidavit with personal knowledge of the facts hereinafter set forth:

That your affiant is engaged in the real estate business, and at all times referred to herein was a duly licensed broker in the District of Columbia.

That Milton Isen, one of the Plaintiffs herein, advised your affiant that he was interested in buying some property in the District of Columbia. That after some conversations and investigations, Mr. Isen submitted a contract for $235,000.00 to the Calvert Corporation, through Mr. William R. Lichtenberg, and the contract was submitted under the name of the Adelton Corporation. This contract was rejected, and on May 14, 1964 Mr. Isen submitted another contract for $275,000.00, using a "straw", one Patricia S. Reyes. This contract contained the notation that 12,500 square feet were zoned C-2.

To this contract Mr. Lichtenberg submitted a counter-offer of $290,000.00. The purchaser did not approve the counter-offer within the stipulated time, and Mr. Lichtenberg declared it invalid.

On May 21, 1964 a new contract was drawn, incorporating all the changes made on the previous contract. The "straw" purchaser submitted this for Mr. Isen. Like the contract before it, it mentioned 12,500 square feet as being commercial.

In all the conversations with the purchaser and seller it was assumed that the commercial line was 125 feet from the front line of the property. This was a mistake on everyone's part, as it was never thought that it could be less than 125 feet, and the contract of course read 12,500 square feet. The property was 100 feet across.

After the settlement was made and all the property conveyed, the Plaintiff, Milton Isen, called affiant and said that the zoning line was only 100 feet back. Affiant checked this at the District Building and, after searching out some old records, found that the additional 25 feet was a special use granted long before. Affiant called Mr. Isen and told him that he – affiant – had checked it personally and found this to be the case.

Mr. Isen insisted that affiant check with Mr. Lichtenberg to see if he, Isen, could not get back some of the money. Affiant did check with Mr. Lichtenberg, and Mr. Lichtenberg offered to get the 25-foot strip rezoned at no cost to Mr. Isen, or to buy back the property. Affiant informed Mr. Isen of this proposal, and affiant went further to say that affiant also would buy the property at the price Isen had paid for it. Mr. Isen told affiant at that time that he was going to see his lawyer.

Affiant states that it should be noted that the plat books at the District Building are printed in a one-inch to 100-foot scale, which is hard to read, and that the lines delineating the commercial areas are usually penned in broad-brush lines. That in the case at bar the line appeared to be 125 feet, and the difference was apparent only after search

of other records. The actual footage never came up in discussion, and was assumed by everyone until after the settlement.

/s/ M. F. WEISSBERG

Subscribed and sworn to before me this 10th day of February, 1966.

/s/ M. D. HUBBARD
Notary Public, State of Virginia

UNDISPUTED FACTS UNDER RULE 9

1. A contract was made, copy of which is agreed to.

2. The item in dispute relating to the amount of commercial zoning is also not in dispute.

3. All the evidence shows that a mutual mistake was made, and that the Defendant agreed to rectify the mistake by a return of the money for a return of the property.

4. There is no evidence sufficient to support the charge of fraud made by the Plaintiffs.

FRIEDLANDER & FRIEDLANDER

/s/ MARK P. FRIEDLANDER
Attorneys for Defendant

[Certificate of Service, dated February 12, 1966]

[Filed Feb. 23, 1966]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their attorneys, oppose Defendant's Motion for Summary Judgment filed herein, and for reason therefor say that it clearly appears from the depositions of the Plaintiffs, the affidavit of the real estate broker filed with Defendant's Motion, and the enclosed affidavit of Plaintiff, Milton Isen, that there are issues of fact involved herein, and that no legal ground exists for dismissal of Plaintiff's cause merely on the basis that the contents of the contract allegedly were tainted by error or mistake.

/s/ SEYMOUR FRIEDMAN, Esq.

/s/ H. MAX AMMERMAN, Esq.
Attorneys for Plaintiffs

[Certificate of Service, dated February 21, 1966]

POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

1. Rule 56, Federal Rules of Civil Procedure.

2. The pleadings, annexed contract, and the deposition of the Plaintiffs herein, all combine to set forth and support the facts outlined in the affidavit of M. F. Weissberg annexed to Defendant's Motion for Summary Judgment herein, namely, that the contract of sale of Defendant corporation expressly represented to the Plaintiffs that the subject property contained 12,500 square feet zoned C-2, and that in fact such property contained only 10,000 square feet so zoned. Whether or not the Defendant corporation mistakenly or knowingly made such repre-

sentation, and whether or not such representation was made in good or bad faith on the part of the Defendant, there is no doubt that the representation was in fact made. There is nothing in the depositions or the affidavit of Weissberg to indicate that Plaintiff, Milton Isen, knew or should have known that the representation was in fact made in error or by mistake, the affidavit pointing out that such knowledge existed only after the settlement was made and the property conveyed.

3. The affidavit of the Plaintiff, Milton Isen, annexed hereto, shows that he was not aware that the property was in fact zoned C-2 for 10,000 square only of its area and not for the full 12,500 square foot area as represented, and that he relied wholly and exclusively upon the representation of the agent and the contracting seller, Defendant herein, in agreeing to purchase the property and in agreeing to pay the price demanded therefor.

4. If the facts thus far revealed do not disclose a genuine conflict or issue of fact, the only conclusion can be that there was a factual misrepresentation, whether in good or bad faith, that Plaintiffs relied thereon, and that they were injured thereby. In such event, judgment should be granted for the Plaintiffs, and a jury of inquisition established for the determination of the amount of injury caused them.

5. In any event, it is clear that Defendant is not entitled to judgment, whether by summary judgment or otherwise herein, and the motion should be denied accordingly.

Respectfully submitted,

/s/ SEYMOUR FRIEDMAN, Esq.

AFFIDAVIT IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA, ss:

MILTON ISEN, being first duly sworn, on oath deposes and says that he does hereby make this Affidavit with personal knowledge of the facts hereinafter set forth:

That your affiant is one of the Plaintiffs in this case, and does hereby make this Affidavit in opposition to Defendant's Motion for Summary Judgment herein.

That on or about May 21, 1964, a contract was submitted by him at a price of $290,000.00, the price requested by the Defendant seller, for purchase of the subject property; that said contract was prepared substantially in accordance with the terms and conditions requested by the Defendant seller and contained an express representation, inserted by the agent M. F. Weissberg at the request and approval of the seller, that the property was zoned to the extent of 12,500 square feet, in category C-2; that your affiant accepted and relied upon such representation as the fact, and that he agreed to pay the purchase price requested by seller of $290,000.00, in substantial part, because of his evaluation of the property based upon it containing at least such area of C-2 zoning.

That your affiant, prior to settlement under the contract herein involved, was not aware of and made no independent investigation as to the extent of zoning on the subject property, but relied wholly on the seller's representation thereof.

And further your affiant sayeth not.

/s/ MILTON ISEN

[Notarial Certificate]

[Filed March 31, 1966]

ORDER GRANTING SUMMARY JUDGMENT

This cause came on to be heard on the motion of the defendant, Calvert Corporation, for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; and the Court having considered the Affidavit of M. F. Weissberg and the depositions of the Plaintiffs, in support of the motion, and the affidavit of the plaintiff, Milton Isen, in opposition thereto, and having considered the points in support of and in opposition to said motion, and the statements of undisputed facts under Rule 9, and the counter-statement under Rule 9, and after argument had thereon, and the Court having found that there is no genuine issue as to any material fact, and no controversial question of fact to be submitted to the trial Court, and having concluded that the defendant is entitled to judgment as a matter of law;

It is, by the Court, this 31st day of March, 1966,

ORDERED, ADJUDGED and DECREED that plaintiffs take nothing, that the action be and it hereby is dismissed on the merits; that the defendants have and recover from plaintiffs its costs in the action, and the defendant have execution therefor.

/s/ OLIVER GASCH
Judge

FRIEDLANDER & FRIEDLANDER
Attorneys for Defendant

[Certificate of Service, March 30, 1966]

[Filed April 26, 1966]

NOTICE OF APPEAL

Notice is hereby given this 26th day of April, 1966, that MILTON ISEN and ADELE ISEN, plaintiffs, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 31st day of March, 1966, in favor of CALVERT CORPORATION, Defendant, against said MILTON ISEN and ADELE ISEN, plaintiffs.

Seymour Friedman
Attorney for Plaintiffs

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,214

MILTON ISEN *et al*
Appellants

v.

CALVERT CORPORATION
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Attorneys for Appellee

APPELLEE'S STATEMENT OF QUESTIONS PRESENTED

Where Appellant sold property and in said contract provided for the acquisition of property to be selected by him in order to effectuate a trade deal in order to avoid or delay the payment of income taxes:

1. Where Appellant brought suit charging deceit predicated upon a contract between Appellant and Appellee, would the fact that the contract was not between Appellant and Appellee and the fraud and deceit were shown to have been mutual mistakes, justify the Court — on summary judgment — to enter an order of dismissal?

2.:

(a) Did the request by the Appellant to a broker to submit a contract on property owned by the Appellee render said broker an agent of the Appellant or the Appellee?

(b) Where said broker, through error and mistake, misdescribed zoning on a portion of the area, was this a misrepresentation entitling Appellant to any relief?

(c) Did the signing of the purchase contract by Appellee amount to a representation of the contents of said contract, particularly where there was inserted before the amount of the zoned area an abbreviation of the word "approximately"?

3.:

(a) Where, presuming that the broker was acting for the Appellee, would a misrepresentation by said broker be the basis for an action of fraud or deceit against the Appellee?

(b) And, presuming that Appellee was responsible for the mistake of the broker, could such responsibility, because of the agency, be the basis for any relief except rescission?

(c) Where the parties to a contract are mutually mistaken about the amount of land zoned, can either party have any relief over and beyond rescission?

4. Upon discovery of the mutual mistake, when the offer of the vendor to rescind and the offer of the broker who made the mistake to buy at the price called for in the contract and release Appellant of the burden of the contract, and Appellant refuses both offers, is the Appellant entitled to any relief?

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CITATIONS

CASES:

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

APPELLEE'S JURISDICTIONAL STATEMENT

On April 8, 1965 Milton Isen and Adele Isen (Appellants herein) filed their complaint against the corporate Appellee, claiming damages for misrepresentation. They asserted that they had entered into a contract with the Appellee for the sale of certain property for the price of $290,000.00. They further said that the purchaser named in the contract was one Patricia S. Reyes, and that she — the said Reyes — had nominally assigned said contract to a certain Arnold Heft. They attached a copy of the contract as their Exhibit "A" to the complaint.

They then asserted that, notwithstanding the fact that Patricia S. Reyes was named as purchaser and that the assignee was Arnold Heft, the true purchasers of the property were these Appellants, and said that the corporate defendant (Appellee herein) knew that they (the Appellants) were the true purchasers. *They further alleged that "negotiations for this purchase were carried on by or on behalf of defendant (Appellee) with or on behalf of the plaintiff (the male Appellant), Milton Isen, as the true party in interest . . ."* [emphasis supplied]

It was further alleged that the purchase contract represented that there was approximately 12,500 square feet zoned C-2, and that the fact was that the property only contained 10,000 square feet zoned C-2; and they said that this was a representation and statement of fact, and should have been known by the defendant to be untrue — "and it was made by the defendant with the intent and for the purpose of inducing reliance by the plaintiff thereon. The plaintiffs did in fact so rely upon said representation of fact, and were thereby induced to act to their injury and damage."

To this complaint the Appellee asserted four defenses:

1. A failure on the part of the complaint to state a cause of action;

2. That the complaint showed on its face that the Appellee was not a party to the contract, and that no privity contract existed upon which the complaint could be sustained;

3. That the Appellants knew or should have known that the premises conveyed did not contain 12,500 square feet zoned C-2; and, most importantly,

4. The Appellee answered, paragraph by paragraph, denying any misrepresentation or fraud.

The Appellee took the deposition of both Appellants, obtained a sworn statement upon personal knowledge from the real estate broker, set

forth undisputed facts under Rule 9, and filed a motion for summary judgment. The Appellants filed an opposition to the motion, and an affidavit from the male Appellant. The Court granted the summary judgment, and this appeal followed.

APPELLEE'S COUNTERSTATEMENT OF THE CASE

The Calvert Corporation, Appellee herein, owned a tract of land consisting of approximately 27,930 square feet located in the District of Columbia. This property was improved by a shopping center which contained a Peoples Drug Store, the office of the Stanley Corporation of America, an Arena Sport Shop, a gift shop, and a laundromat — all of which properties were leased and producing an income of in excess of $26,000.00 per annum (Pltfs. Exhibit #1; J.A. 3). The land was 100 feet wide and was zoned back 100 feet for commercial use. The additional 25 feet back was for special use granted long before (J.A. 44).

The male Appellant was a real estate broker and had been such a broker for twenty years (J.A. 13). The principal source of income of the male Appellant was in building and holding such completed buildings for investment, and he was familiar with plans, classifications and plats (J.A. 13).

The Calvert Corporation (Appellee) was represented in the District of Columbia through William R. Lichtenberg, who was the Treasurer of the said corporation. Mr. Lichtenberg is a prominent lawyer in the District of Columbia.

The Appellants were the owners of a tract of land known as the Marist Tract (J.A. 19), and they contracted in January of 1964 to sell the same to one Arnold Heft for $775,000.00 (J.A. 23). In order to avoid or postpone the payment of taxes on this sale they arranged a contract wherein the Appellants had a right to select property and to advise Heft

to acquire such property. Heft was then to trade it to Appellants as part of the consideration for the Marist Tract sale (J.A.19).

After the contract to sell the Marist Tract, the male Appellant asked Marvin Weissberg — along with a number of other brokers — to find him some property (J.A. 30). As a result of his conversations with the Weissberg office, Weissberg arranged for a contract to be submitted to the Appellee (J.A. 34-35). The Adelton Corporation was named as the purchaser in the contract. The offer was rejected, and a counter-offer was then made by the Appellee, raising the purchase price but otherwise leaving the terms as they appeared.

In order to prepare this contract the real estate firm went to the plat books of the District of Columbia. These plat books are printed in a 1" to 100' scale, and are hard to read. Lines delineating the commercial areas are penned in in broad-brush lines, and the real estate man believed that the commercial area was back 125 feet on the property he sought to buy. Neither the Appellants nor the Appellee checked the research of the real estate man, and the real estate man — in error — described the land being purchased in the contract. However, the Appellants did not approve the counter-offer within the time stipulated, and it was declared invalid.

Later, on May 21, 1964, a new contact was drawn by the same real estate firm, incorporating the terms of the previous contract, and the purchaser named in this contract was an employee of the real estate firm, one Patricia S. Reyes. This contract, after being prepared, was supported by a check for a deposit and was personally submitted to the representative of the Appellee, William R. Lichtenberg, at Mr. Lichtenberg's office. The submittal was made by the real estate broker and the male Appellant (J.A. 43-44, and 22).

The Appellant did not remember if he had told the real estate firm how to describe the land or if he had specifically told them to make it

like the first contract, but in any event, at the meeting in Lichtenberg's office, Lichtenberg added the abbreviation "appr." to the contract in the clause describing the square footage which was zoned C-2. This change was initialed "W.R.L." and "P.S.R.", although Patricia S. Reyes was not present, and apparently someone else put her initials on the paper. After an adjustment of the commission, the contract was signed by the Appellee, and thereafter the contract was settled at the title company, the deed passed, and the purchase price was paid.

After the foregoing, the male Appellant called the real estate man and told him that the zoning line was only 100 feet back. The real estate man went to the District Building and searched out some old records, and found that it was true — that the zone C-2 only went back 100 feet, but that the additional 25 feet was for special use granted long before. This fact was only apparent after a search of other records, as the original plat books indicated the 125-foot commercial zoning.

Thereupon, the real estate man — under the impression that the male Appellant was unhappy with the deal — offered to buy back the property for exactly what Appellant had paid for it, and Mr. Lichtenberg — representing the Appellee — when he learned of the question raised, also offered to buy back the property for exactly what Isen had paid for it. Lichtenberg also offered to get the 25-foot strip rezoned at no cost to Mr. Isen, if Isen did not want him to buy back the property (J.A. 44). Isen told the real estate man that he was going to see his lawyer, and the suit for damages for misrepresentation was thereafter filed against the Appellee — but not against the broker.

SUMMARY OF ARGUMENT

1. In an action for misrepresentation (deceit), the law requires that the complaining party prove by clear and concise evidence that a misrepresentation occurred, either with knowledge of the untruth or

with a reckless disregard of the truth, and that it was relied upon to the damage of said complaining party — none of which elements are present in the case at bar.

2. A mutual mistake, although forming the basis for a rescission of a contract, cannot ever be the basis for an action for damages for deceit.

3. The broker in the transaction was a broker for the purchasers (the Appellants), and at the most would have been considered a broker for both sides.

4. Presuming, for the sake of argument, that the broker was acting for the Appellee, any mistake by the broker — although supporting an action for rescission — cannot be the basis of a misrepresentation charge against the seller.

5. Presuming that there was a mutual mistake which was actionable, such action would only be for rescission and, where Appellee and the broker both offered to make the purchasers whole by taking the property at their cost, no action by Appellants would then be available to them.

ARGUMENT

I

The Requirements of an Action for Damages for Misrepresentation Were Not Met

Although the Appellants herein brought suit for damages for misrepresentation, the depositions and the affidavits did not meet the requirements.

In *New York Title and Mortgage Co. v. Hutton,* 63 App. D.C., at pages 266 and 271, 71 Fed. 2d 989, this Court said:

> "The action here was deceit, and on such an issue misrepresentations believed to be true, though the result of ignorance or negligence, will not sustain the action. No doubt a false statement recklessly made without knowledge of its truth or falsity is actual fraud, but in that case there must be knowledge of the falsity, or a reckless disregard of the truth, to justify saying the misrepresentation was fraudulent."

In *Public Motor Service v. Standard Oil Company of New Jersey*, 69 App. D.C. 89, 91; 99 Fed. 2d 124, the Court said:

> "It is settled also that fraud must be shown by clear and convincing evidence (citing authorities) and by evidence which is not equivocal, that is, equally consistent with either honesty or deceit (citing authorities)."

In the Maryland Court of Appeals, in *Levin v. Favorite*, 226 Md. 626, 174 A.2d 723, the Court said:

> "They contend that the trial court erred in failing to find (1) that there was a misrepresentation as to the zoning of the property on the part of the plaintiff-seller, and (2) that there was a mutual mistake of fact made by the parties, either of which would render the contract voidable at the option of the appellants-buyers. Both conditions center around the fact that the property was being used as seven apartments, for dwelling units, under a temporary certificate from the Building Inspection Engineer . . . but was not actually zoned for use and occupancy as a seven-unit multiple family dwelling."

In that case the Court held that there was no evidence to show either fraud or mutual mistake.

In the case at bar, in view of the shopping center's operation and the special use of the rear twenty-five feet, there is no claim as to any

fraud, and certainly there is no evidence of fraud and no evidence — really — of a material mistake.

The case at bar deals with an appellant-buyer who for twenty years has been a real estate broker and is familiar with building, that being the source of his income. In most of the cases, where the purchaser has successfully reclaimed his money and has rescinded a contract, an ignorant and inexperienced purchaser is involved. That is not the situation here.

An example of the effect of inexperience and ignorance of a purchaser of realty is illustrated in *Hiltpold v. Stern,* 82 A.2d 123, decided by the then Municipal Court of Appeals for the District of Columbia in June of 1951.

II

Mutual Mistake Cannot Be the Basis for an Action for Damages for Misrepresentation

Innocent, mutual mistakes have been the basis for rescissions of contracts, for a defense of specific performance cases, and for like litigation, but they cannot be the basis for an action of deceit, because the action of deceit is founded on fraud or moral wrong.

In the case at bar it is conceded that the agent of the corporate Appellee, a prominent attorney, committed no act upon which any claim for misrepresentation could be based. It is further conceded by all the papers that the real estate broker made a mistake and that it was his act which was claimed to be the basis of the suit.

III

The Broker Acted for the Appellants and Not for the Appellee

An examination of the complaint shows that the male Appellant claimed that negotiations were carried on in his behalf as the true party in interest. The "straw party" who acted for him was an agent of the broker's office, and the male Appellant directed that the offer be made originally through a corporation solely controlled by him, and later received a counter-offer from the Appellee which died because of inaction on the part of the Appellants. The last contract submitted was at the direction of the Appellants. And so it can be seen that every step of the road the real estate broker was, not only negotiating for the purchasers, but was lending the purchasers its employee as a "straw party."

Further, in the deposition of the male Appellant, he said that he was quite sure: "When Marvin Weissberg discussed this deal with Lichtenberg it was on my behalf . . ." (J.A. 135); and, further, when he was pressed as to whether he had been told that the property was not on the market — that is to say, not offered for sale — he stated that he did not remember whether he was told that or not by the broker (J.A. 33); and, further, the male Appellant testified that the employee of the real estate broker was a "straw party" for him — the Appellant — and he repeated this at Joint Appendix 38.

The undisputed evidence, as shown in the affidavit of the real estate broker (J.A. 43), was to the effect that the male Appellant advised the real estate broker that he — the male Appellant — was interested in buying some property in the District of Columbia; that after conversations and investigations the male Appellant submitted a contract to the Calvert Corporation through William R. Lichtenberg, and this contact was submitted under the name of the Adelton Corporation.

So it can be seen that the broker was not employed by the seller (Appellee), but was attempting to act for the buyers (Appellants).

IV

Presuming That the Broker Was Acting for the Appellee the Motion for Summary Judgment Was Still Proper

Although any mistake made by the broker could have been the basis for a rescission, it could not have been the basis for deceit. In *Griswold v. Gebbie,* 126 Pa. 353, 17 A. 673, the Court said that, while it is the general rule that a principal is liable for the misrepresentations of his agent, yet the action of deceit being founded on fraud or moral wrong, cannot be sustained against the principal on a mere mistake, as the fraud must be clear, and that there should be in addition evidence of participation or knowledge on the part of the principal, or at least circumstances which should have put him upon inquiry.

The law is clear that a vendee may be entitled to a rescission of a contract for misrepresentations by a broker, but that does not support the conclusion that the vendor would be bound to such an extent as to make him liable for damages or for a reduction of the purchase price. — *Mayo v. Wahlgreen,* 50 Pa. 40, 43; 9 Colo. App. 506.

To the same effect it is the reasoning in *Clark v. Kirsner,* 74 A. 2d 830, where the Court said that, unlike an action of deceit, rescission may be had for innocent misrepresentations, and cited authorities from Maryland.

The case cited by the Appellants — *Turner v. Brewer,* 54 App. D.C. 363, 298 Fed. 685 — was a case seeking the return of a deposit — which is the same as rescission.

A principal, while being prevented from taking the benefit of a mistake of his agent — mutual or unilateral — is not held liable for such error to the extent that he can be marked for damages for fraud.

The situation would be different if the principal had participated in some wrong or had shut his eyes to a fraud, knowing better; but in the case at bar, if there was a mistake, it was of no consequence in the valuation of the property, and at most would have justified a cancellation of the contract so that the seller (Appellee) could have back its property, and the purchasers (Appellants) could have back their money; but the said Appellants certainly are not allowed to have the benefits of the improved property, and at the same time seek damages for a mutual mistake.

V

If the Appellants Had the Right To Rescind, Their Election Not To Rescind Terminates All Claims They May Have Had Based on Mistake

Presuming, for the sake of argument, that the broker was the agent of the seller (Appellee), and presuming further that a mistake was made by the broker which was material, when this fact became known to the Appellee, said Appellee immediately offered to do two things: It offered, free-of-charge, to rezone the property (J.A. 44), or to buy back the property at the price the Appellants had paid for it.

These offers by the Appellee were rejected; and, in addition thereto, the broker who had made the error also came forward and said: I will buy back the property at the price you paid for it — and this offer also was rejected.

The effect of these facts is to make clear that, even though we interpret the facts as strongly as possible in favor of the Appellants, the most one can arrive at is the right of the Appellants to rescind the contract. This was offered to them by both the principal and the agent, but they did not want a rescission and they rejected both offers. They also could have had the property rezoned free-of-charge, but this did not suit their purpose, as they wanted to rezone the entire tract, including some other property not part of this purchase (J.A. 40).

The representation made by the representative of the Appellee was that he could get it rezoned, and that he would represent the Appellants free-of-charge in getting it rezoned. When the male Appellant attempted to obtain a rezoning, he sought to rezone not only the entire property purchased under this contract, but also adjoining properties.

CONCLUSION

The Court below was clearly right in granting summary judgment in favor of the Appellee, and that decision should not be disturbed.

Respectfully submitted,

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